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Nos. 463, 464, 465, 466, 467, 468, 473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

INTERSTATE COMMERCE COMMISSION v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

THE PENNSYLVANIA RAILROAD COMPANY v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ERIE RAILROAD COMPANY, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

THE NEW YORK CENTRAL RAILROAD COMPANY v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ARMCO STEEL CORPORATION, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

DELAWARE RIVER PORT AUTHORITY, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

UNITED STATES OF AMERICA v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

On Appeal From The United States District Court For The District Of Maryland

REPLY TO BRIEFS IN OPPOSITION TO MOTION TO AFFIRM

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November 12, 1957.

The Daily Record Co., Baltimore 3, Md.

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Preliminary Statement

There are three reasons why the appellees submit this reply to the appellants' briefs in opposition to the motions to affirm in Nos. 464, 465, 466, and 467. Although the same motions were also filed in Nos. 463, 468 and 473, the appellants therein have filed no briefs in opposition.

The first reason is that the appellants seek to confuse the issue by pretending that this is not a relationship case. The second is that the appellant Pennsylvania Railroad cites a decision of the Interstate Commerce Commission which is dated October 25, 1957, or 9 days after the motion to affirm was filed. The third is that the appellant Erie Railroad and other New York appellants accuse the appellees of "attempting to mislead" the Court "as to the nature of the District Court's decree".

In the motions to affirm already filed with this Court on October 16, 1957, there are full statements of the facts in this litigation, the reports of the Interstate Commerce Commission,[1] and the decision of the three-judge District Court which reversed it.[2]

Argument

We shall consider each of these three reasons separately.

First. In arguing that this is not a relationship case, the appellants seek to avoid the consequences of the inadequate findings by the Commission. They say that the District Court was wrong in holding that the Commission "prescribed" equal rates from the ports of Baltimore, Philadelphia, and New York, and to support their point the appellant Pennsylvania Railroad quotes a *part* of a sentence from our motion to affirm.[3]

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[1] *Iron Ore from Eastern Ports to Central Freight Association Points*, 291 I.C.C. 527, 299 I.C.C. 195.

[2] *The Baltimore & Ohio Railroad Company et al. v. United States et al.*, 151 F. Supp. 258.

[3] The appellant Pennsylvania Railroad, at p. 3 of its reply, quotes these appellees as saying that "The Commission did not prescribe parity as a principle." The entire sentence in appellees' motion to affirm reads as follows: "The Commission did not prescribe parity as a principle to govern future rate-making, nor did it make any findings which would preclude rates on different levels if justified by a different record."

When the District Court used the verb "prescribe" to indicate what the Commission's action in this proceeding had been, it had in mind the substance, not the form. For the Commission had approved rates which produced parity and disapproved rates which disrupted parity; and the net result was a requirement of parity in the light of the rates which had been proposed in the particular proceeding before it. In point of fact the Commission itself used the verb "prescribe" to describe its action in the present case. In the same decision[4] of October 25, 1957, cited at p. 8 of the Pennsylvania Railroad's reply, the Commission observed (Sheets 12-13, 18):

> The described evidence would inject into this proceeding the issue of port relationship as between Philadelphia and Baltimore, *which was decided in Iron Ore from Eastern Ports to C.F.A. Points, 291 I.C.C. 527 and 299 I.C.C. 195. Our order therein is the subject of court proceedings.*
>
> * * * * * *
>
> *As previously noted, in Iron Ore from Eastern Ports to C.F.A. Points, supra, we required a parity of rates from Philadelphia and Baltimore. In view of the required cancellation herein of the proposed rates from Philadelphia, the maintenance of the prescribed parity requires the prompt cancellation also of the proposed rate from Baltimore under suspension in the above-mentioned second supplemental order.* We shall expect the Baltimore carriers to take such action.

We note with interest that three days after the release of the foregoing report the Commission issued a "corrected" report deleting the italicized passages.

Second. On a round-trip by ocean from Labrador (Seven Islands, Quebec) to Philadelphia there is a saving of 310

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[4] *Iron Ore, Ex-Labrador, Canada to Youngstown, Ohio Area*, I. & S. Docket No. 6742, . . I.C.C. . . decided October 25, 1957 (mimeographed).

nautical miles as against a round-trip to Baltimore. This of course is highly significant in any case involving the relationship of import rates by rail from these two ports. In the first place, the Labrador ore interests (which are also appellants herein)[5] employ their own vessels for a heavy part of this ocean transportation and the saving of nautical miles is a saving of steaming time which, in turn, represents money in their pockets. In the second place, the same Labrador ore interests are vitally concerned with obtaining high vessel utilization, and a saving of 310 miles on the average round-trip means almost two more round-trips to Philadelphia than are possible to Baltimore during the limited ore shipping season from Labrador.

These are the factors which, not dealt with in the Commission's decision approving equal rail rates, caused the District Court to remand for further findings. For obviously, if Philadelphia already has the advantage on the ocean part of the through transportation, equal rail rates with Baltimore will give it an advantage on the through transportation from Labrador to Youngstown; and it is the through transportation which counts. The Commission's error is compounded by the fact that this advantage accrues to the benefit of the port (Philadelphia) with the longer rail distances to destination — a situation which, for 80 years, has justified higher rates from Philadelphia than from Baltimore on import traffic.

In contesting the District Court's remand, the appellant Pennsylvania says in its reply (at p. 8) to the motions to affirm:

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[5] Armco Steel Corporation, M. A. Hanna Company, Iron Ore Company of Canada, National Steel Company (Weirton Steel Company Division), Republic Steel Corporation, Wheeling Steel Corporation, and The Youngstown Sheet and Tube Company (collectively known in this litigation as the Labrador ore interests).

> In a recent decision, *Iron Ore, Ex-Labrador, Canada to Youngstown, Ohio Area*, Investigation and Suspension Docket No. 6742, ... I.C.C. ....., decided October 25, 1957 (mimeographed), in which the question of ocean costs from Labrador to Philadelphia and Baltimore was injected by these appellees, the Commission found the uncontroverted testimony to be that, regardless of whether the ocean movement from Seven Islands is to Philadelphia or Baltimore, the charge to the shipper for a particular vessel is the same, whether it is controlled by the shipper or is under charter or contract of affreightment (Sheet 13).

In other words, according to the Commission, if the Labrador ore interests pay *themselves* $1.00 per ton for hauling ore from Labrador to either Philadelphia or Baltimore those two ports occupy equal competitive standing despite the fact that the costs of this same transportation to the same Labrador ore interests may be 70 cents in the case of Philadelphia and 90 cents in the case of Baltimore.

The fallacy of the Commission's conclusion is evident. Instead of providing a reason against the District Court's order in the instant case, the Pennsylvania Railroad, by citing the decision of October 25, 1957, only emphasizes the propriety of the remand and the necessity of upholding it. Certainly, in a relationship case involving an important use of private transportation the Commission cannot stop at what the shipper takes out of one pocket without knowing what he puts back in the other pocket.

Moreover, by citing the decision of October 25, 1957, the Pennsylvania Railroad in no way contradicts the advantage which Philadelphia, because of its shorter ocean distance, has over Baltimore in allowing approximately two more round-trips during the ore shipping season by other vessels which, while not owned or controlled, are under long-term contracts of affreightment to the Labrador ore interests.

Third. In the reply to the motions to affirm filed by the New York appellants the appellees are accused of "attempting to mislead" this Court. The New York appellants (at p. 6 of their reply) say:

> Having mislead the District Court into believing that the Commission had prescribed a parity of rates and having secured a reversal by the District Court, the Baltimore railroads now urge this Court to affirm the District Court decision by attempting to mislead it as to the nature of the District Court's decree.

The New York appellants go on to say (at p. 7 of their reply) that under the terms of the District Court's decree "the New York carriers would never be able to make effective equalizing rates from New York if the District Court's order is affirmed," and they refer to its second paragraph. This paragraph (which the New York appellants inaccurately paraphrase) provides in *full* as follows:

> 2. That the Temporary Restraining Order issued by the Court on October 26, 1956, enjoining the United States and the Interstate Commerce Commission from taking, authorizing, approving, or permitting any action, by any railroad company, particularly the New York Central Railroad Company and the Erie Railroad Company, which would have the effect of establishing or making effective the tariff schedules on iron ore from New York filed to be effective February 9, 1953, is made permanent.

There is nothing in this paragraph which would prohibit the same rates from New York as from the other ports provided they can be justified as lawful under the provisions of the Interstate Commerce Act. In no sense is it a continuing order directed against parity as such. On the contrary, the decree is directed against rates named in specific tariff schedules "filed to be effective February 9, 1953." To Youngstown these schedules included a rate of $2.71 from New York. Since this rate was proposed, the Baltimore rate

to Youngstown has been increased to $3.67. Under the decree there is certainly no bar to New York's trying to justify equalization at the present $3.67 level, or any other level that may apply. Even if the Baltimore rate should go back to the $2.71 level at some time in the dim future, the decree would not bar a New York proposal to match it.

This does not mean, if New York should try again, that its burden of proof would be any less or that it could escape a showing that parity rates from New York were properly related to those from Baltimore. In the present record of course there was a complete failure of proof in this regard, and what is more, the Commission failed to make adequate findings. Accordingly, the District Court had no option but to enjoin the rates from New York.

Conclusion

The motions to affirm should be granted. The briefs in opposition only emphasize the propriety of such action on the part of this Court.

Respectfully submitted,

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November 12, 1957.